

Suzy Curtains, Inc., and Lorraine Home Fashions of China and Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC. Cases 11-CA-13913, 11-CA-13980, 11-CA-14114, and 11-CA-14219

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On October 4, 1991, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions, a supporting brief, and a brief in answer to the Respondent's exceptions, and the Respondent filed a brief in reply to the Charging Party's brief. The Respondent also filed a motion for a new trial, and the Charging Party filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, and to adopt the recommended Order as modified.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we find no foundation for the Respondent's assertions that the judge "distorted," "mischaracterized," or "created" record testimony in his discussion and analysis of the evidence. Similarly, there is no basis for finding that bias or prejudice exists merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses or because of the extent of the judge's recommended remedy. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949). Therefore, we deny the Respondent's request for a new hearing.

² As part of his remedy, the judge recommended that the Union's certification year be extended by a full year to provide a sufficient period of time for the bargaining process to have a fair chance to succeed. The Respondent excepted to the extent of the remedy. While we agree with the judge that the nature and scope of the Respondent's unfair labor practices would tend to create disaffection among employees and undermine the bargaining process, we note that the parties had engaged in several months of apparently productive bargaining prior to the onset of the Respondent's unlawful conduct. In these circumstances, we believe that extending the certification year by 6 months, running from the date that the Respondent begins to bargain in good faith, will more closely restore the status quo ante, by both accounting for the time lost in bargaining as a result of the Respondent's unlawful conduct and providing a reasonable period of time to resume negotiations. *Colfor, Inc.*, 282 NLRB 1173 (1987). We shall modify the recommended Order accordingly.

I. CONTRACT DURATION PROPOSAL

The judge found that the Respondent violated Section 8(a)(5) of the Act by proposing in June 1990, some 8 months into negotiations with the Union for an initial contract, that the agreement's duration be coextensive with the Union's certification year. In doing so, the judge cited two grounds for his determination.³ First, he found that the particular employee petition calling for a decertification election which the Respondent cited as its basis for making the proposal was not sufficient to provide the Respondent with a good-faith doubt about the Union's continued majority status. Second, he found that because this petition was circulated among employees during a time when the Respondent was engaging in other unfair labor practices, it was thereby tainted and could not serve as a credible gauge of employee sentiment. Although we agree, for the reasons set forth in section II of this decision, that the Respondent engaged in unfair labor practices prior to the circulation of the decertification petition, we do not rely on this unlawful conduct in finding that the Respondent unlawfully proposed that the contract expire on a date coterminous with the end of the Union's certification year. Instead, we rely solely on the Respondent's failure to prove that it had sufficient objective considerations to support a claim of good-faith doubt of the Union's continued majority status.⁴

The Respondent argues that the judge's analysis with regard to the absence of a good-faith doubt is at odds with the reasoning expressed by the Supreme Court in *NLRB v. Curtin Matheson*,⁵ and its progeny. *Curtin Matheson* is readily distinguishable on its facts from the case before us and, as explained below, our decision here is fully compatible with the Court's reasoning. Thus, we find the Respondent's reliance on *Curtin Matheson* misplaced.

In *Curtin Matheson*, the Court was presented with the issue of evaluating an employer's good-faith doubt of a union's majority within the context of a strike—specifically, whether the Board could correctly refuse to adopt a presumption that strike replacements opposed union representation. This "no presumption" approach marked a change in the Board's policy from one in which replacements were presumed to support a union in the same proportion as the original employee complement. In concluding that the Board's revised approach was consistent with the Act, the Court

³ Contrary to the Respondent's arguments in support of exceptions, the judge did not rely, even in part, on a factual finding that the parties had already resolved the issue of contract duration when the Respondent made its proposal.

⁴ Chairman Stephens would rely on both the lack of objective considerations as well as the commission of unfair labor practices prior to the circulation of the employee petition in finding that the Respondent's proposal violated the Act.

⁵ 494 U.S. 775 (1990).

rejected the argument that the new policy amounted to an abandonment of the good-faith doubt defense to a refusal to bargain charge. The Court stated:

The Board's requirement of some objective evidence indicating replacements' opposition to the union does not amount to a requirement that the employer prove that the union *in fact* lacks majority status. To show a good-faith doubt, an employer may rely on circumstantial evidence; to show an actual lack of majority support, however, the employer must make a numerical showing that a majority of employees in fact oppose the union. [Emphasis in original; citation omitted.]⁶

In the instant case, the parties were negotiating for an initial contract within the Union's certification year. A union is entitled to an irrebuttable presumption of continuing majority status for 1 year following its certification.⁷ After 1 year, the presumption becomes rebuttable. Thus, since the Respondent could not directly challenge the Union's majority status until the October anniversary of its certification, i.e., by withdrawing recognition and refusing to bargain, it chose the only route available during these negotiations to contest the Union's standing: to propose a contract expiration date which would permit the earliest possible challenge. Once the certification year elapses, an employer may lawfully withdraw recognition if it is able to rebut the union's continuing majority presumption either by establishing that the union has actually lost its majority, or by showing that it had a reasonably based doubt as to the union's majority status.⁸ Because of the special protection afforded bargaining relationships during their first year, the same standards apply to assessing the lawfulness of an employer's insistence on a contract duration coextensive with the certification year as apply to postcertification year withdrawals of recognition. Thus, in order to find lawful the Respondent's adherence to the certification year contract duration proposal, it has the burden of showing either that the Union had actually lost its majority standing, or that the Respondent held an objectively based good-faith doubt of the Union's majority.⁹

When the Respondent made its certification year contract expiration proposal to the Union, it cited as its sole basis and motivation, an employee petition calling for a decertification election. In addition, at the hearing in this proceeding, the Respondent stipulated on the record that its proposal was based on the employee pe-

tition which claimed that the Union lacked majority support. At the time the Respondent made its proposal, it asserted that it believed that the petition was supported by a majority of the unit. Not long thereafter, however, the Respondent learned not only that there were fewer signatures on the petition than were first suggested, but also that the unit itself was larger than the Respondent had thought. The Respondent discovered that there were 150 employees in the unit but only 74 valid signatures on the petition, 2 less than the number needed to show a loss of a majority. The petition on which the Respondent grounded its proposal, therefore, did not establish that the Union actually had lost majority support, nor did it, alone, provide an objective, reasonable basis for doubting the Union's majority.¹⁰ Subjective impressions notwithstanding, the Respondent's asserted doubt simply lacked an appropriate foundation.

Despite the reason cited to the Union when the proposal was made and the Respondent's trial stipulation concerning its reasons, the Respondent now contends that when it made its proposal, it relied not only on the petition, but also on information that employees in addition to those whose names appeared on the petition were opposed to continued representation by the Union. Both at the hearing and now in its exceptions, however, the Respondent could refer only to one bit of testimony in support of this contention: that the employee who presented the Respondent with the petition told its representative that "others" would have signed the petition but were afraid to do so. The employee did not identify the "others" or provide even one estimate of how many "others" were referred to; and no further statements or information regarding employee disaffection appear in the record. Thus, the Respondent's claim that it had reason to believe that there were disaffected employees besides those who signed the petition rests on this single bare assertion. That assertion does not provide an objective basis on which to conclude that employees other than the petition signers did not want the Union to represent them, and thus it fails, even when coupled with the petition, to constitute adequate circumstantial evidence of employee disaffection, to justify under *Curtin Matheson*, the Respondent's asserted doubt of the Union's majority.

⁶ 494 U.S. at fn. 8.

⁷ *Brooks v. NLRB*, 348 U.S. 96 (1954).

⁸ *Guerdon Industries*, 218 NLRB 658 (1975); *Chet Monez Ford*, 241 NLRB 349 (1979); *Robertshaw Controls Co.*, 263 NLRB 958 (1982).

⁹ Cf. *Hinde & Dauch Paper Co.*, 104 NLRB 847 (1953); *Vulcan Steel Tank Corp.*, 106 NLRB 1278, 1280 (1953); *Lloyd A. Fry Roofing Co.*, 123 NLRB 647, 650 (1959).

¹⁰ Chairman Stephens notes that, under the view expressed in his concurring opinion in *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1065 (1989), the petition would provide a sufficient basis for conducting, with appropriate safeguards, a poll to determine whether the Union lacked majority support. In his view, such a poll could be conducted to determine whether it would be appropriate, in light of *Hinde & Dauch Paper Co.*, 104 NLRB 847 (1953), to propose a contract limited to the certification year.

Member Raudabaugh notes that the Respondent made no attempt to poll employees. He expresses no opinion concerning the circumstances in which he would permit polling, with sufficient safeguards.

II. REMOVAL OF UNIT WORK IN THE RESPONDENT'S WAREHOUSE

The judge found that by unilaterally promoting warehouse leadperson Jay Grimes to supervisor and reorganizing its entire warehouse operation, the Respondent eliminated certain unit work. In adopting the judge's determination on this issue, we agree with his finding that the record does not support the Respondent's assertion that no unit work was lost by its unilateral actions. While the judge's analysis focuses primarily on the unreliability of payroll records offered by the Respondent to corroborate its claim that there were more employees working in the warehouse after the promotion and reorganization than before, we believe that the loss of work from the unit is also demonstrated by evidence regarding Grimes' job duties before and after his being made supervisor.

As warehouse leadperson,¹¹ Grimes' duties included: checking freight in and out, helping load and unload trucks, helping order pullers and stockers, and helping, as needed, throughout the warehouse. In early June 1990, the Respondent promoted Grimes out of the unit. In response to questions raised by the Union in a negotiating session in July, the Respondent first stated that Grimes' postpromotion duties were limited to ensuring that his former tasks were carried out by other employees. The Respondent also stated that two new employees were hired to do Grimes' old job. At the same time, however, the Respondent wanted to compensate these "replacement" employees at a lower rate than Grimes had been getting, because their responsibilities were to extend to just one part of Grimes' job, i.e., checking freight in and out.¹² Further discussions between the parties also revealed that Grimes continued to perform aspects of his old job for some unspecified time after his promotion, and that the Respondent planned to have Grimes fill in on warehouse jobs when needed. At a negotiating session in September, the Respondent advised the Union that because of its reorganization of the warehouse, Grimes' former job was eliminated, and that his functions were no longer necessary.

¹¹ During the 1989 representation proceeding, the Respondent contested the inclusion of the warehouse leadperson in the bargaining unit.

¹² Although the Respondent contends it hired two new employees, classified as order pullers, to replace Grimes on his promotion, a seniority roster the Respondent gave the Union during negotiations also shows that it terminated two order pullers at approximately the same time. Thus, as the judge found, the Respondent's claim that it increased its warehouse employee complement in order to handle work available as a result of Grimes' removal from the unit is not corroborated by the Respondent's records. The revised and restricted job description for the so-called replacement employees further suggests that work previously done within the unit was being done elsewhere.

This evidence establishes that the functions once performed by warehouse unit leadperson Grimes were thereafter being done, to some extent, by Warehouse Supervisor Grimes. The Respondent acknowledged that the "replacements" were going to be responsible for only one aspect of Grimes' previously multifaceted job. The Respondent never accounted for how Grimes' other functions—his various "helping" responsibilities—would be accomplished, except to say that, as supervisor, Grimes was responsible for getting the work done, including performing various warehouse responsibilities himself "if someone was out." We find that the record thus establishes that Grimes' promotion to supervisor was largely semantic, and that what had previously been described as helping was later being called responsible oversight. Regardless of characterization, however, the Respondent's action resulted in the unlawful unilateral removal of work from the bargaining unit, in violation of Section 8(a)(5) of the Act.¹³

III. DISCIPLINARY WARNING TO CHRISTINE WILEY

The judge found that the Respondent unlawfully issued a written warning to a known union adherent, Christine Wiley, for harassment of fellow employee Savita Patel, who had signed the petition seeking decertification of the Union.¹⁴ In making his findings, the judge assessed all the circumstances surrounding the incident, including the exchange between the employees, the investigation by management, and the issuance of the warning itself, and considered testimony from the involved employees and supervisors. His determination that the Respondent violated Section 8(a)(3) was guided in large part, however, by evidence of the Respondent's handling of a separate problem between two other employees, Zelda Smith and Margaret Carroll, which, by comparison, established that the Respondent engaged in discriminatory disparate treatment of Wiley. We agree with the judge's analysis.

As fully set forth in the judge's decision, Wiley's job was to sew and repair curtains and place them in a bin. Patel then would take them from the bin and place them on a table for the folders. In August 1990, Wiley noticed that the curtains were thrown over the table rather than laid out on it. She admonished Patel that that was a "lazy way" of doing things. Patel became upset and reported to their supervisor, Eddie Lewis, that Wiley had yelled at her. Before speaking to Wiley, Lewis wrote out a warning. He then called

¹³ Contrary to the Respondent, this case is distinguishable from *St. Louis Telephone Employees Credit Union*, 273 NLRB 625 (1984), in which there was only an insignificant temporary loss of unit work while the employer found replacements for 21 unit employees who were simultaneously promoted to supervisory positions.

¹⁴ In accord with the Charging Party's cross-exception, we correct the inadvertent reference in sec. III.(D).(4) of the judge's decision to Patel being a native of Indiana rather than India.

Wiley into his office, reported Patel's allegations, and gave Wiley the written reprimand, charging her with "harassment." During this meeting, Wiley admitted the "lazy" comment, but denied yelling at Patel. After issuing the warning, Lewis asked other employees working in the area if they had heard the exchange, but no one was able to verify the content. The only conduct for which Wiley had previously been disciplined was attendance.

The rather summary disposition of discipline in this instance stands in marked contrast to the Respondent's handling of another employee conflict 2 months earlier, in June 1990. In that case, Carroll first approached Smith about signing the decertification petition. Smith responded that she supported the Union. Later that day, as Smith and Carroll worked side-by-side putting curtains on rods, Carroll repeatedly hit Smith in the back with a rod, claiming that Smith was trying to take over her work area. When Smith moved away to work with the curtain frame and drill, Carroll asserted that she needed the drill. Smith reported the entire matter to Supervisor Jerry Loftis, including her refusal to sign the petition being proffered by Carroll. Loftis told her not to worry about it. The next day Carroll approached Smith at her workstation, pointed her finger in her face, and angrily and loudly complained that Smith was using her tools and materials.¹⁵ Loftis responded to this complaint by having Smith work elsewhere for that day. By the end of that week, Smith also told Supervisor Lewis about Carroll's continuing behavior. Lewis suggested that Carroll might be reacting to having new employees in her longtime work area, and said he would talk to her.

When Smith next tried to do display work, she found that Carroll had locked the tools away. Smith reported this to Lewis, who again promised to talk to Carroll about it. After 3 weeks of being assigned to jobs outside Carroll's area, Smith was again given display work. When Carroll saw her in the area, she approached Smith, pointing and yelling at her, and drew back her hand. Smith placed her hand on the drill on the table, whereupon other employees intervened. After that day, Loftis did not assign Smith work in the warehouse.

Smith made her complaint known to the Respondent's personnel director, Kim Weibel, who served as company spokesperson during negotiations, as well as to the Union. In addition, the problem between Smith and Carroll was raised at a union meeting as well as by the Union at the bargaining table. Despite the rather high profile and the continuing, escalating nature of this conflict—replete with allegations of profane language and physically threatening gestures—there is no evidence that Lewis or other management officials in-

vestigated the matter, and it is undisputed that the Respondent took no disciplinary action against Carroll. The Respondent's only response was to remove Smith from Carroll's work area.

The Respondent offered no explanation as to why the Wiley-Patel exchange, which involved no profanity, no threats, and no third parties, resulted in an immediate written warning, without benefit of investigation, but the Smith-Carroll incidents were not pursued. Aside from the severity of the conduct at issue, the only distinguishing characteristics between Wiley's conduct and Carroll's are their attitudes toward the Union. Accordingly, we find that the Respondent's disparate treatment of Wiley is clearly established, and we affirm the judge's finding that the warning she received was discriminatorily motivated in violation of Section 8(a)(3) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Suzy Curtains, Inc., and Lorraine Home Fashions of China, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Recognize and, on request, bargain in good faith, and for 6 months thereafter as if the initial certification year had not expired, with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

All production and maintenance employees, shipping and receiving employees, plant clericals, and assistant supervisors at the Respondent's 433 Barringer Drive, Charlotte, North Carolina facility; excluding all office clerical employees and guards and supervisors as defined in the Act."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

¹⁵ The tools and materials used by employees were provided by the Respondent and were not employees' personal property.

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT insist that the collective-bargaining agreement with the Union be coterminous with the Union's certification year.

WE WILL NOT unilaterally reorganize our warehouse or other departments, and/or unilaterally promote employees to supervisory positions, resulting in a loss of bargaining unit work, without notifying the Union and giving it an opportunity to bargain about such matters.

WE WILL NOT threaten employees that raises will be withheld or with other reprisals because of the Union, nor promise benefits to employees to encourage them to withdraw support from the Union.

WE WILL NOT fail and refuse to provide the Union with relevant information relating to health and safety matters affecting bargaining unit employees.

WE WILL NOT issue written warnings to or otherwise discriminate against employees because of their activities on behalf of, or in support for, the Union.

WE WILL NOT unilaterally implement pre-bid procedures for bargaining unit positions without first notifying the Union and giving it an opportunity to bargain about such matters.

WE WILL NOT withdraw recognition from, or fail and refuse to recognize and bargain with, the Union as the exclusive bargaining representative of our employees.

WE WILL NOT unilaterally grant wage increase, unilaterally change methods of computing pay, unilaterally grant employees holidays unilaterally change our procedure for selecting employees to work during inventory, unilaterally implement new attendance policies and/or unilaterally change other terms and conditions of employment of employees in the bargaining unit without notifying the Union and giving it an opportunity to bargain about such matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL revoke the written warning to Christine Wiley, expunge this warning and any reference to it from her personnel file, and notify her in writing this has been done, and that evidence of the warning against her will not be used as a basis for future personnel actions against her.

WE WILL recognize and, on request, bargain in good faith and for 6 months thereafter as if the initial certification year had not expired, with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

All production and maintenance employees, shipping and receiving employees, plant clericals, and assistant supervisors at the Respondent's 433 Barringer Drive, Charlotte, North Carolina facility; excluding all office clerical employees and guards and supervisors as defined in the Act.

SUZY CURTAINS, INC., AND LORRAINE HOME FASHIONS OF CHINA

Jasper C. Brown, Jr., Esq. and Joseph T. Welch, Esq., for the General Counsel.

W. Melvin Haas, III, Esq. and Jeffery L. Thompson, Esq. (Haynesworth, Baldwin, Johnson and Harper), of Macon, Georgia, for the Respondent.

Michael G. Okun, Esq. (Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence), of Raleigh, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard these cases in Charlotte, North Carolina, on April 22, 23, and 24, 1991. The charges which gave rise to these cases were filed by Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, herein called the Union, against Suzy Curtains, Inc. and Lorraine Home Fashions of China (Respondent) on July 6, August 15, and November 2, 1990, and on January 7, 1991. On October 1, 1990, an order consolidating cases, consolidated complaint, and notice of hearing issued. On December 17, 1990, and February 14, 1991, the later cases were added and amended consolidated complaints issued. In its final form as issued on February 14, 1991, the amended consolidated complaint alleges inter alia that Respondent violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), by informing an employee that raises would be withheld from employees because the Union had been selected as their collective-bargaining representative; by issuing a written warning to a leading union advocate; by insisting that the duration of the first collective-bargaining agreement be coextensive with the Union's initial certification year at a time while prior unfair labor practices remained unremedied; by subsequently withdrawing recognition from the Union; and by making various unilateral changes in terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain about these changes.

In its answer to the consolidated complaints, as amended at the hearing, Respondent admitted certain allegations including the filing and serving of the charges; its status as a single employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the

trial, all parties filed timely briefs with me which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Suzy Curtains, Inc. is, and has been at all times material, a Delaware corporation with a facility located in Charlotte, North Carolina, where it is engaged in importing, warehousing, and distributing imported draperies. Lorraine Home Fashions of China is also, and has been at all times material, a Delaware corporation with a facility located in Charlotte, North Carolina, where it too is engaged in importing, warehousing, and distributing of imported draperies. The consolidated complaint alleges, and Respondent admits, that the two are affiliated business enterprises with common ownership, directors, management, supervision, and common labor policies. They have held themselves out to the public as a single integrated business enterprise, and constitute a single employer within the meaning of the Act. In the course and conduct of its business operations, Respondent annually purchases and receives at its Charlotte, North Carolina facility goods and products valued in excess of \$50,000 directly from points located outside the State of North Carolina.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the business of importing, warehousing, and distributing of imported draperies at its facility in Charlotte, North Carolina. Various sewing operations are carried on at the Charlotte facility, where Respondent employees approximately 140 to 150 employees.

Following a Board-conducted election, on October 12, 1989, the Board certified the Union as the exclusive collective-bargaining representative in the following unit:

All production and maintenance employees, shipping and receiving employees, plant clericals, and assistant supervisors at the Respondent's 433 Barringer Drive, Charlotte, North Carolina facility; excluding all office clerical employees and guards and supervisors as defined in the Act.

On February 16, 1990, the Acting Regional Director for Region 11 of the Board issued a consolidated complaint and notice of hearing against Respondent in Cases 11-CA-13432 and 11-CA-13560. This consolidated complaint alleged that Respondent violated the Act by promising employees benefits if they rejected the Union as their collective-bargaining representative; threatening employees with loss of wages if they selected the Union; threatening employees with more

strict enforcement of work rules and with plant closure if they selected the Union; restricting employees from communicating with other employees because of their union activities; interrogating employees concerning their union activities; and discharging one employee and failing to promote another employee because of their union activities. In May 1990, Respondent and the Union executed a settlement agreement covering all the allegations in the consolidated complaint, and this settlement agreement was approved by the Regional Director for Region 11 on May 15, 1990. This settlement agreement contained a specific nonadmission clause in which it was acknowledged that Respondent did not admit having engaged in the unfair labor practices alleged in the complaint. The notice to employees called for by the settlement agreement was to be posted from May 25 through July 24, 1990.

B. Negotiations from October 1989 to June 1990

After the Union was certified in October 1989, Respondent and the Union began negotiating on October 30. Between then and the end of June 1990, the parties had held more than 15 bargaining sessions. Respondent was represented by its counsel in this case, W. Melvin Haas III and Personnel Director Kim Wiebel. The Union was represented by a spokesman from the International Union and by an employee committee. From January 11, 1990, onward, the Union's International spokesman was Harris Raynor.

As is often the case, certain ground rules were laid out at the beginning of negotiations. The parties here agreed to initial and date each separate proposal as it was agreed upon. It was also agreed that none of the contract proposals were fully agreed to until the entire contract had been agreed upon. By June 1990, numerous proposals had been tentatively agreed to, including grievance-arbitration provisions, work rules, discipline and discharge provisions, union dues-checkoff, and strike and lockout provisions. Even the duration of the contract had apparently been resolved.

The Union had initially proposed a 3-year agreement. Respondent initially proposed an 18-month term extending through June 30, 1991. During negotiations the parties were able to agree to specific wage increases during the first 2 years of the agreement. Due to Respondent's financial concerns, it would not agree to a specific wage increase for a third year. The parties eventually reached agreement on a wage-reopener for the third year, and this provision was initiated by the parties on June 13, 1990.

The next bargaining session was scheduled for June 26. Prior to that meeting, the Union distributed leaflets to employees indicating that it was hopeful final agreement would be reached at that meeting and a ratification vote would be held on the evening of June 26.

C. June 1990: The Employee Petition and Respondent's Proposal to Make the Collective-Bargaining Agreement Coextensive with the Certification Year

Sometime between June 21 and 25, employee Jean Broom presented Personnel Director Kim Wiebel a petition signed by numerous employees stating they no longer wished to be represented by the Union. It is undisputed that at the time Broom gave this petition to Wiebel, she told Wiebel that the petition had a majority of employee signatures. The parties

stipulated there is no evidence to indicate that Respondent played any part in the preparation of this petition. The petition on its face appears to contain 79 employee signatures. Wiebel testified that after receiving the petition, she compared the signatures to signatures on insurance cards in each employee's personnel file. Wiebel concluded that only 75 of the signatures were current employees. Wiebel testified that at this time she thought there were 145 employees in the bargaining unit. Wiebel admitted that she learned 1 week later there were actually 150 employees in the unit.

A bargaining session was held as scheduled on June 26, but no significant progress was made. Near the end of the day, Respondent informed the Union that it had received the petition which it believed was signed by a majority of the employees indicating they no longer wished to be represented by the Union. Respondent stated that the petition might change its position on the duration of the proposed collective-bargaining agreement and might mean it had the right to offer a contract term coextensive with the Union's certification year. Respondent gave the Union two case citations. Another meeting was scheduled for June 28.

At the meeting on June 28, Respondent notified the Union it was officially taking the position based on the employee petition that it wanted a collective-bargaining agreement coextensive with the Union's certification year. There is no dispute that Respondent based this position solely on the employee petition. After the June 28 meeting, no additional contract terms were agreed to by the parties.

Throughout all of July and the first week of August, Respondent continued to demand that any collective-bargaining agreement expire with the certification year in October. Near the end of the first week in August, Respondent had it pointed out by the Board's Region 11 office that there were only 74 signatures on the petition rather than 75. At the bargaining session on August 8, Respondent withdrew the proposal that any agreement terminate with the certification year in October. Nevertheless, the parties never made any further progress in negotiations. Moreover, Respondent did not return to a tentative agreement for a 3-year agreement. Rather, from that point onward, Respondent insisted on a 1-year agreement.

D. Events Between June 28 and Expiration of the Certification Year on October 12, 1990

1. June and July: Removal of bargaining unit work

At a bargaining session on July 11, 1990, Union Spokesperson Harris Raynor told Respondent that the most recent seniority list provided to it no longer carried the name of Jay Grimes as a bargaining unit employee. Grimes was a leadperson in the warehouse, and after some dispute between the parties, it had been agreed that he was part of the bargaining unit. Raynor asked Respondent what had happened to Grimes. Respondent informed Raynor that Grimes had been promoted to supervisory status and that it was waiting to work out with the Union what to pay his replacement. Respondent stated it wanted to replace Grimes, a class IV employee earning \$7 per hour with a class III employee who would be paid \$5.50 per hour. Raynor asked what Grimes duties had been. Respondent told Raynor Grimes had been responsible for checking freight in and out; helping to load and unload trucks; helping order pullers and stockers; help-

ing all warehouse employees; and directing order pullers and stock people. Respondent stated that Grimes replacement would perform only the first duty of checking freight in and out. When Raynor later asked what had happened to the rest of Grimes' duties and who was to do it, he did not receive an answer.

Apparently the subject of Grimes' duties was not raised again until a bargaining session on September 13, 1990. When the Union raised the subject again at that meeting, Personnel Director Wiebel told the Union that it could forget about Grimes' job as the warehouse had been reorganized and his former functions were no longer necessary. Raynor objected to elimination of Grimes' job and the removal of his duties from the bargaining unit.

Warehouse Manager Jerry Loftis admitted that he had promoted Grimes to a supervisory position in early June 1990 as a part of a reorganization of the warehouse occurring at that same time. It is uncontraverted that both Grimes' promotion and the reorganization of the warehouse were done unilaterally without notifying the Union or giving it an opportunity to bargain. Loftis admitted that he discussed both the reorganization and Grimes promotion with Personnel Director Wiebel and Corporate CEO Rittenberg before either was undertaken. Loftis acknowledged that Grimes received no raise upon this promotion and that he continued to perform some of the same duties as before the promotion. According to Loftis, however, Grimes primary responsibility after the promotion was to see that the same duties he previously helped others to perform still got done by other employees. Loftis testified that two new employees were hired in the warehouse shortly after and because of Grimes' promotion.

Wiebel did not dispute that she learned of the warehouse reorganization and Grimes' promotion in or before June. Nor did Wiebel dispute the fact that she did not tell the Union about the reorganization until the September 13 negotiating session. Finally, Wiebel admitted that Grimes continued to perform at least some of the duties he had previously performed between the time of the reorganization in June and the July 11 negotiating meeting.

Respondent admits that Grimes was unilaterally promoted to a supervisory position. Respondent argues, however, that the promotion did not result in the loss of any bargaining unit work. As noted, Loftis testified that two additional employees were hired for the warehouse shortly after Grimes promotion. As further noted by Respondent, Loftis testified that after Grimes' promotion, the only time he actually performed physical labor himself was when someone failed to report to work. Otherwise, his time was spent overseeing the work being performed by bargaining unit personnel.

Respondent's claim that there was no loss of bargaining unit work is not supported by the record. Respondent introduced payroll records for the week ending June 2, 1990, prior to Grimes' promotion, which show 30 or 31 bargaining unit employees on the payroll in the warehouse area. Payroll records for the period ending June 30 at first seem to indicate 33 employees on the payroll in that area. Cross-examination established, however, that a number of employees whose names appeared on the latter document had actually been separated from their employment prior to the date of that exhibit. A seniority list provided by Respondent to the Union for the week ending June 30 showed that on June 27

there were actually only 27 employees at work in the warehouse, 6 less than suggested by Respondent and 3 less than prior to Grimes' promotion. From the available evidence, I conclude that both Grimes' promotion and the unilateral reorganization of the warehouse resulted in a loss of bargaining unit work.

2. Early July and mid-August: the threat to withhold raises

Employee Vernell Norman worked in Respondent's bagging and boxing department on a piecework basis with a base rate of \$4 per hour. Norman testified that in early July 1990 she went to her supervisor, Shirley Bailey, and asked if she could get a raise because she was not satisfied with her paycheck. Norman testified Bailey replied that she could not get a raise "until October because of the Union." This ended the conversation.

Norman testified that later in mid-August fellow employee Macy McCorkle quit over unhappiness with low wages. McCorkle asked Norman to tell Assistant Plant Manager Eddie Lewis that she had quit and why. Norman told Lewis and her own supervisor, Shirley Bailey, about McCorkle quitting. Norman testified Bailey responded that she could not understand McCorkle quitting because employees were being allowed to record downtime so they could make production "because I told you we can't give you a raise until October because of the Union."

Bailey testified she had only one conversation with Norman on the subject of raises. Bailey denied having the second conversation with Norman concerning McCorkle. Bailey testified that when Norman approached her about a raise, Bailey told Norman that since Respondent was negotiating with the Union, they would have to reach a settlement before raises could be given. Bailey testified that she gave this response as a result of a meeting she had with Assistant Plant Manager Eddie Lewis in which she was instructed how to answer questions concerning raises while negotiations were ongoing.

I do not doubt Bailey that she was guided by Respondent how to answer questions from employees about raises. It is even possible she told Norman that since Respondent and the Union were negotiating, they would have to reach a settlement before raises could be given. I credit Norman, however, that she had two conversations with Bailey on the subject and that in each conversation Bailey said Respondent could not give employees raises "until October because of the Union" or words to that effect. I found Norman a credible witness. I note too that by the time of these conversations, Respondent had advanced its proposal that any agreement would terminate with the end of the certification year in October, and negotiations had immediately bogged down. Realistically there was little reason to believe that the parties could reach agreement on a contract which would last only 3-1/2 months. In all likelihood, therefore, Respondent would not be in a position to grant employees raises until October when the certification year expired and Respondent might withdraw recognition on the basis of the petition signed by employees. Norman's testimony is not only credible but altogether plausible under the circumstances. I credit her entirely.

3. July: the Union's requests for information

By letter dated July 18, 1990, the Union requested specific information from Respondent relating to health and safety matters. The Union requested this information expressly in order to properly represent employees in contract negotiations, but also in preparation for a planned visit by its own industrial hygienist to Respondent's facility. The information requested included OSHA logs and forms from 1987 to 1990, records relating to air contaminants, health insurance, disability insurance, health insurance claims, occupational injury claims, and workers compensation insurance.

The Union's request for information was discussed at length at the next bargaining meeting on July 24. It should be first noted that there has never been any challenge to the relevancy of any of the requested information. Following their discussion at the negotiating session on July 24, some of the requested material was provided to the Union at the August 28 negotiating session. Respondent provided the Union with requested OSHA logs only for the years 1987 to 1989 relating to Suzy Curtains and for only 1 year relating to Lorraine Home Fashions of China. As to the failure to provide the logs for Lorraine other than the 1 year, Wiebel told the Union and testified before me as well that Respondent simply did not have these forms other than for that year. Although the form requires on its face that it be maintained for 5 years, there is no evidence to contradict Wiebel's testimony that the forms do not exist.

As to Respondent's failure to produce the OSHA forms for Suzy Curtains for the current year, Wiebel testified that the form was not complete until 1991. Wiebel testified that she told the Union about this and that Raynor replied, "okay" and that he would "get back with me." Raynor specifically denied that on rebuttal, and I credit Raynor. Wiebel admitted on cross-examination that although the form did not need to be completed until 1991, she nevertheless posted information on the form periodically, but did not provide what had already been completed.

Regarding workers compensation information, Wiebel testified she told Raynor that the information was in the hands of Respondent's insurance carrier, but that she would try to obtain information about any specific accident or injury that he might wish. According to Wiebel, Raynor never got back to her. Raynor specifically denied Wiebel's version of the conversation. Raynor testified credibly that although Wiebel did say the information was in the hands of the insurance carrier, she also stated she would obtain the material. I credit Raynor. I also credit Raynor that Wiebel never did so. Finally, I credit Raynor that at subsequent meetings on September 6 and 13, 1990, Raynor asked again for the workers compensation information, but never received anything. I do not credit any of Wiebel's claims that Raynor agreed to accept less than all of the information requested, except where she might have told him it simply did not exist. Wiebel told Raynor that information concerning air contaminants did not exist, that Respondent had no disability insurance, and that there was no analysis of health claims. There is no evidence to the contrary. In conclusion, I find that while certain of the requested information did not exist, much information did exist, including the OSHA form for 1990 and information regarding workers compensation claims, which Respondent failed to provide to the Union.

4. August: the written warning to Christine Wiley

Christine Wiley has been employed by Respondent for approximately 8 years. Wiley works a sewer in the tailor department. Prior to August 1990, Wiley had never been reprimanded, warned, or even counseled for anything other than attendance.

Respondent admits that Wiley was one of the leading advocates of the Union. Wiley was active in the union campaign from the beginning. She handed out leaflets, wore union buttons, served as the Union's observer at the Board-conducted election, and thereafter worked on the Union's negotiating committee.

Wiley's job involves sewing and repairing curtains. After completing her sewing operation, she places the curtain in a bin which is beside her machine. A bin tender then removes the curtains from the bin and places them on a table where they are folded and packaged.

On August 13, 1990, Wiley and Jane Parker were working next to one another, while Savita Patel worked as their bin tender. Patel, who recently signed the petition to get rid of the Union, had worked in the same area as Wiley for more than 5 years. As they were working, Wiley noticed that Patel picked up some curtains from her bin and threw them over the table rather than lay them out on the table for the folders. Wiley asked Patel why she threw the curtains on the table and asked if she was going to fold them. According to Wiley, Patel responded by telling Wiley to shut up and that she was not going to fold the curtains because they were repairs. Wiley testified she told Patel that not all the curtains were repairs, and that some of them were regular curtains. Patel again repeated that she was not going to fold them. Wiley admits she told Patel that was a "lazy way" of doing things. Patel, a native of Indiana who candidly admitted having some trouble understanding English, testified somewhat differently. According to Patel, Wiley said to her, "Are you lazy?" According to Patel, Wiley hollered at her and pointed at the curtains. Patel told Wiley that she was going to see their acting supervisor, Assistant Plant Manager Eddie Lewis, which she did. There is no dispute about the fact that Patel complained to Lewis.

Nor is there any dispute that Lewis wrote out a warning to Wiley for "harassment" without even investigating the matter and without even speaking with Wiley. Lewis claimed that it is his practice to fill out a warning before talking with the individual to be warned. Lewis claimed he would simply destroy the warning if he changed his mind after talking to the individual involved. For the most part, Lewis was a candid and credible witness, but I find these claims absurd. Lewis could not remember any individual he had similarly written up in the past. Moreover, Lewis acknowledged it was normal practice to investigate matters before issuing a warning. Lewis admits that he did not do so in Wiley's case. Approximately 1 hour after the conversation between Wiley and Patel, and Patel going to Lewis, Wiley was called into the office where she was confronted by Lewis and Supervisor Betty Glenn. Lewis accused Wiley of having harassed Patel by hollering at her and calling her lazy. Lewis then issued the written warning for "harassment." Wiley admitted using the word "lazy" to describe Patel's work, but Wiley denied hollering at Patel. Lewis testified that when Wiley admitted calling Patel "lazy," he wrote this on a separate note, but he did not show it to Wiley or ask her to sign it.

After Lewis had already issued the warning to Wiley, Lewis asked other employees working in the area what they had observed. Lewis spoke to employee Jane Parker who was working only a few feet from Wiley. Parker told Lewis that she did not pay any attention to the conversation between Wiley and Patel and that she did not hear what was said. Lewis also spoke to employee Annie Chastain about the incident. According to Lewis, he spoke to Chastain on the day after it occurred. According to Chastain, however, Lewis spoke to her 3 or 4 days after the incident occurred. Lewis claimed that Chastain came to him in his office, while Chastain admitted that Lewis approached her. Lewis and Chastain both admit that Chastain told Lewis she could not hear what was said between Wiley and Patel, but Chastain nevertheless described Wiley as talking to Patel "like a dog." Chastain admitted that she was 20 to 25 feet away from them during the conversation between Wiley and Patel.

Lewis admitted he had never warned anyone for "harassment" before the warning to Wiley. Lewis testified he was aware, however, of two other women having been given warnings for verbal abuse. Further examination revealed that the abusive language in both of those incidents involved the use of profanity. Lewis admitted that Patel did not accuse Wiley of having cursed her.

Shortly before the incident between Wiley and Patel, Patel had signed the petition to get rid of the Union. Counsel for General Counsel introduced fairly strong evidence of disparate treatment accorded employee Margaret Carroll, an employee known to oppose the Union, when she initiated a confrontation with employee Zelda Smith. It is not necessary to describe the confrontation between Carroll and Smith in every detail. Smith asked Carroll to sign the employee petition opposing the Union. Smith declined and told Carroll she supported the Union. Later, Smith was assigned on two separate occasions to work near Carroll. On both occasions, Carroll initiated a confrontation with Smith which included Carroll bumping into and poking Smith. Carroll even told Smith she was not going to allow Smith to use "her tools," although they actually belonged to Respondent.

Smith went and complained to Assistant Plant Manager Lewis after the first confrontation with Carroll. Smith testified credibly she told Lewis she had been approached by Carroll to sign the antiunion petition which she declined to do, and that since then, there had been problems. Lewis admitted never even speaking to Carroll about the incident. In fact, Smith was even assigned once more to work in the same area with Carroll. When Smith again went to Carroll's area, she found that Carroll had actually gone so far as to lock tools in a tool box and take the key, thereby preventing Smith from having access to the tools. Smith asked Carroll for the key to the tool box. Carroll accused Smith of taking a note pad from her table, used profanity and yelled at Smith that "you people" were trying to take over her area. Smith is black. Carroll is white. Smith admits that in the course of the confrontation, it became so heated that she picked up a drill and raised her hand to strike Carroll if necessary to defend herself. Another employee intervened, however, and pulled Smith away from the incident. Smith again went to Assistant Plant Manager Lewis and complained. Lewis, who admitted he was aware that Carroll was opposed to the Union, took no disciplinary action against Carroll and did not even investigate the matter.

5. August 15: unilateral implementation of prebid procedure

Prior to the advent of the Union at Respondent's facility, there was no procedure for bidding or prebidding on vacant positions. During negotiations the Union proposed bidding for vacancies. At a meeting on February 28, it also presented a proposal for prebidding for skilled positions. The parties discussed the issue and decided to limit prebidding procedures to sewer positions. Raynor changed the Union's written proposal to reflect that limitation, and a tentative agreement was prepared. At the next bargaining session, the parties initialed the agreement regarding bidding on vacancies and prebidding on sewer positions. The contract proposal tentatively agreed to by the parties clearly states that prebidding is limited to sewing machine operator positions. At that same meeting, Respondent asked the Union for permission to implement prebidding for sewer positions prior to reaching a final collective-bargaining agreement. The Union agreed.

Respondent stipulated that on or about August 15, 1990, it posted a job prebidding procedure for positions of folders, boxers, and baggers. Respondent admits that it did not notify the Union or give it an opportunity to bargain about this extended prebidding procedure. The Union filed a charge with the Board regarding this matter, and brought the matter up at the next negotiating session. At their September 13 meeting, Respondent advised the Union that it was taking down its posting.

E. Withdrawal of Recognition Following Expiration of Certification Year and Subsequent Unilateral Changes

On October 12, 1990, 1 year to the day after the Union was certified by the Board, Jean Broom, the same employee who spearheaded the earlier petition, brought a second petition to Personnel Director Wiebel. Broom told Wiebel that this time she had several more than a majority of the employees sign the petition. In fact, the new petition contained the signatures of 76 employees out of 139 then in the bargaining unit.

After verifying the signatures of employees on the petition against employee insurance cards, Wiebel wrote a letter on behalf of Respondent dated October 15 withdrawing recognition from the Union.

Almost immediately after withdrawing recognition, and continuing for several months, Respondent began to institute a series of unilateral changes in wages, hours, and working conditions. On October 26, 1990, less than 2 weeks after withdrawing recognition from the Union, Respondent granted a wage increase of from 20 cents to 50 cents per hour to all hourly employees. Prior to the advent of the Union, Respondent gave no across-the-board raises to hourly employees and had no standard practice of awarding increases periodically.

On November 14, 1990, Respondent unilaterally changed its method of computing holiday pay for piece rate employees so that their average wages were used to compute holiday pay instead of their base rates. The Union had proposed this change during negotiations prior to the withdrawal of recognition. The increase in pay was substantial, almost doubling the pay of certain employees whose production was significant.

On November 23, 1990, Respondent granted employees the day after Thanksgiving as an additional paid holiday. This too had been one of the Union's proposals during negotiations, and in fact had been tentatively agreed to by the parties.

In December 1990, Respondent unilaterally changed its procedure for selecting employees to work during inventory. Both parties agree that at some point Respondent changed its criteria for selecting employees to work inventory by instituting certain selection criteria, including the imposition of a test and the application of attendance requirements. Employee witnesses called by counsel for General Counsel testified that these changes occurred for the first time during the inventory in December 1990, while Wiebel testified that the change occurred in December 1989 and simply continued thereafter. I do not credit Wiebel's testimony. The testimony of employees Martha White, who has worked for Respondent more than 25 years, Christine Wiley, and Joretha Hagans supports a conclusion that prior to December 1990, Respondent's supervisors merely asked employees if they wanted to work during inventory, and chose those employees who agreed to work.

During negotiations, the parties discussed inventory and overtime pay. In fact, on April 6, 1990, the parties reached a tentative agreement on an overtime proposal which provided that employees would be chosen to work on inventory on one Sunday per year. There were no other requirements attached to inventory work pursuant to this proposal. It stands to reason that if Respondent had been using and wanted to continue selection criteria they would have been discussed and included in this tentative proposal. However, they were neither discussed nor included.

In advancing the claim that selection criteria were instituted during inventory in December 1989, Wiebel testified that she even posted a notice on the bulletin board at that time notifying the employees of the new requirements. Wiebel also claimed that she retained copies of all notices she had posted. I purposely gave Wiebel the opportunity to present such a notice for the record, and I reserved an exhibit number for that purpose. Respondent failed to produce the purported notice, and instead offered a circuitous explanation in place of record testimony. I sustain the objection of opposing counsel to consider the explanation given by Respondent's counsel in lieu of record testimony. The simple fact is that I gave Respondent an opportunity to present the documents which Wiebel swore existed, and Respondent has failed to do so. I conclude that Respondent failed to produce the alleged notice because it does not exist, and I also conclude that Respondent first imposed selection criteria for working inventory in December 1990 as evidenced by credible record testimony from employee witnesses. That conclusion is supported by several pieces of evidence offered by Respondent as well. Wiebel claimed that selection criteria were imposed when fewer employees were needed for inventory work after the use of "bar codes" were put into effect. Wiebel and Warehouse Manager Jerry Loftis both acknowledged that the use of bar codes and scanning equipment was introduced for the first time during the December 1990 inventory. During another point in her testimony, Wiebel claimed that Respondent had talked with the Union about selection criteria for working inventory before this was implemented. Wiebel stated that it was Raynor with whom the em-

ployer had talked about this in negotiations. Raynor, however, did not become involved with negotiations until January 1990. All of this evidence strongly suggests that the changes in inventory selection occurred not in 1989 but in 1990.

Considered as a whole, the evidence strongly supports a conclusion that selection criteria for working inventory were not imposed until December 1990. I conclude as well that Respondent never notified the Union or gave it an opportunity to bargain about the imposition of such criteria.

On January 1, 1991, Respondent unilaterally implemented a new attendance policy. For the most part this new policy also contained changes that had been proposed by the Union during negotiations.

Analysis and Conclusions

The complaint alleges and counsel for General Counsel contends that Respondent violated Section 8(a)(5) of the Act by insisting that the duration of the first collective-bargaining agreement be coextensive with the Union's initial certification year at a time while prior unfair labor practices remained unremedied. In support of this position, counsel for General Counsel and the Union cite the Board's decisions in *Chet Monez Ford*, 241 NLRB 349 (1979), and *Robertshaw Controls Co.*, 263 NLRB 958 (1982). In both of those cases, the Board held that an employer is not free to withdraw recognition from the certified collective-bargaining agent when prior unfair labor practices were found to have occurred and the Employer had not yet fully complied with the Board's remedial order. It is important to note, however, that in both cases, hearings had been held before an administrative law judge who had specifically found violations of the Act, and these decisions had been affirmed by the Board. In the instant case, there has been no prior hearing and no prior finding that Respondent engaged in unfair labor practices. Rather, after a consolidated complaint issued in Cases 11-CA-13432 and 11-CA-13560, the parties executed a settlement agreement which was approved by a Regional Director on May 15, 1990. This settlement agreement contained a specific nonadmission clause in which it was acknowledged that Respondent did not admit having engaged in the unfair labor practices alleged in the complaint.

The issue then is whether an informal settlement agreement containing a nonadmission clause carries the same weight as a decision containing specific findings that Respondent has engaged in unfair labor practices for purposes of applying the rule that an Employer is not free to withdraw recognition in the face of unremedied unfair labor practices. No party has cited any case directly on point, and I find none.

In *Carpenters District Counsel of Sequoia (Lattanzio Enterprises)*, 206 NLRB 67 (1973), the administrative law judge relied on settlement agreements to establish the existence of prior unfair labor practices. In that case, however, the settlement agreements contained a specific provision which read, "Respondent's and each of them agree that this settlement stipulation and ensuing Board Order and court decree may be used in any proceeding before the Board or an appropriate Court to the same extent as an adjudicated decision of the Board enforced by a United State's Court." In his decision, the administrative law judge acknowledged, "I am aware that the Board has frequently held that settlement

agreements, and consent decrees arising therefrom, have no probative value in establishing that violations of the Act have occurred." In acknowledging this proposition, the administrative law judge cites *Teamsters Local 70 (C & T Trucking)*, 191 NLRB 11 (1971).

First, it should be expressly noted that language from both *Lattanzio* and *C & T Trucking Co.* is technically dicta as applied to the instant case. Both cases involve a different purpose for determining whether prior unfair labor practices have occurred, i.e., whether Respondent has shown a proclivity to violate the Act such that a broad cease-and-desist order should issue. I find no direct precedent precluding the Board from holding that because Respondent had not yet fully complied with a settlement agreement, including posting of the notice called for in that agreement, it was not free to question the Union's majority status. Such a holding would certainly be administratively efficient. Nor could the Employer be heard to complain since it voluntarily chose to enter into the settlement agreement. Nevertheless, while there is no case directly on point, the Board decisions in *Chet Monez* and *Robertshaw Controls* do appear to be grounded in the fact that there had been prior findings of unfair labor practices. Since the Board generally views settlement agreements as not being sufficient to establish prior violations of the Act, I reject counsel for General Counsel's argument that Respondent violated the Act by insisting that the duration of the first collective-bargaining agreement be coextensive with the Union's initial certification year "at a time while prior unfair labor practices remain unremedied."

It does not necessarily follow that Respondent was privileged to insist that the duration of the first collective-bargaining agreement be coextensive with the Union's certification year. The Board has very clearly held that an Employer may lawfully insist on a contract termination with the certification year "only when it has reasonable belief based on objective considerations that the Union no longer possesses majority support." *Crestline Hospital Assn.*, 250 NLRB 1439 (1980). The facts must also demonstrate that the proposal is not made in bad faith or to achieve an illegal purpose. *Grace & Hornbrook Mfg. Co.*, 225 NLRB 15 (1976). Both decisions remain viable, as seen by the Board's recent decision in *Lithium Corp.*, 275 NLRB 1482 (1985). For the following reasons, I find that the petition signed by employees in June 1990 was not sufficient to give Respondent a reasonable belief that the Union no longer possessed majority support. The petition on its face appears to contain 79 employees' signatures. Personnel Director Wiebel compared the signatures on the petition to signatures on employee insurance cards and determined that only 75 of the signatures were current employees. While Wiebel testified that she thought there were 145 employees in the bargaining unit, I find that what Wiebel may have thought is not determinative or even relevant to the issue. If an assessment of Wiebel's credibility was significant, I would have to say that I found Wiebel less than candid in several respects and generally self-serving in all respects. I do not believe, however, that this issue should depend on Wiebel's credibility. Even Wiebel admitted that she learned within a week after receiving the petition that there were actually 150 employees in the bargaining unit. Therefore, it is clear even by Wiebel's testimony that Respondent knew within days after receiving the petition it was not supported by a majority of employees. As I have said,

however, I do not accept the proposition that Wiebel's subjective belief plays any part in determining whether there are objective considerations that the Union no longer possessed majority support. The fact is there were only 74 valid signatures on the petition in a bargaining unit of 150 employees. Respondent has not carried its burden of establishing that it had a reasonable belief based on objective considerations that the Union no longer possessed majority support.

Even if I found that Respondent had met its burden of proving it had a reasonable belief based on objective considerations that the Union no longer possessed majority support, I would nevertheless find in the context of this case that Respondent was not privileged to insist on a contract terminating with the certification year because the petition circulated among employees was contemporaneous with other unfair labor practices engaged in by the Respondent. More specifically, the record establishes that beginning in early June and continuing thereafter Respondent unilaterally reorganized its warehouse and, in conjunction with that, unilaterally promoted an employee, resulting in a loss of bargaining unit work. Warehouse Manager Loftis admitted that employee Grimes was promoted to a supervisory position in early June 1990 as part of a reorganization of the warehouse occurring at that same time. There is absolutely no question that both the promotion and the reorganization were done unilaterally. Further, the record supports the conclusion that both the promotion and the unilateral reorganization of the warehouse resulted in a loss of bargaining unit work. I find that Respondent's unilateral actions in this regard violate Section 8(a)(1) and (5) of the Act. I would therefore find, as well, that Respondent's contemporaneous unfair labor practices preclude it from relying on the employee petition to establish objective considerations that the Union no longer possessed majority support.

In early July 1990, employee Vernell Norman asked Supervisor Shirley Bailey if she could get a raise. As I have found above, Bailey replied that Norman could not get a raise "until October because of the Union." In mid-August, Norman had another conversation with Supervisor Bailey in which Bailey told Norman, "I told you we can't give you a raise until October because of the Union." I have credited Norman that in each of these conversations, Bailey specifically stated that Respondent could not give employees raises "until October because of the Union" or words to that affect. By the time of these conversations, Respondent had advanced its proposal that any collective-bargaining agreement terminate with the end of the certification year in October. Since the Union was not likely to agree to a contract of only a few months duration, it is indeed likely that Respondent would not be in a position to grant employees raises until October when the certification year expired and Respondent might withdraw recognition on the basis of the petition signed by employees. Supervisor Bailey's comments to Norman represented a double-edged sword. On the one hand, Bailey expressly blamed the Union for the fact that employees could not be given a raise. Bailey's statement contained not just a threat of reprisal but a fact of reprisal toward employees because of the Union. Bailey's remarks to Norman also carried the clearly implied promise of a raise in October once Respondent was in a position to grant such a raise. I find, therefore, that Supervisor Bailey's remarks represented both a threat of reprisal against employees because of the

Union and an implied promise of benefit to employees to encourage them to withdraw support from the Union. For both of these reasons, Supervisor Bailey's remarks violate Section 8(a)(1) of the Act, and I so find.

During July 1990, the Union requested specific information from Respondent relating to health and safety matters. There has never been any challenge to the relevancy of the requested information. Some of the requested material was provided to the Union. Some of the material does not exist, and Respondent cannot be required to provide what it does not have. Other information, however, including an OSHA form for 1990 and information regarding workers compensation claims does exist but was never provided to the Union. I find that Respondent's failure to provide such relevant information violated Section 8(a)(1) and (5) of the Act.

Christine Wiley has been employed by Respondent for 8 years. Prior to August 1990, Wiley had never been reprimanded, warned, or even counseled for anything other than attendance. Wiley was one of the leading advocates of the Union, a fact which Respondent admits. During August 1990, Wiley had a relatively minor confrontation with fellow employee Savita Patel during which Wiley described Patel or her work as being "lazy." Patel complained to Assistant Plant Manager Eddie Lewis. Lewis wrote out a warning to Wiley for "harassment" without even investigating the matter and without even speaking with Wiley. Lewis acknowledged that it was normal practice to investigate matters before issuing a warning. Lewis admitted, however, that he did not do so in Wiley's case.

Counsel for General Counsel introduced strong evidence of disparate treatment accorded employee Margaret Carroll, an employee known to oppose the Union, when she initiated confrontations with employee Zelda Smith. Carroll's actions were far more severe than Wiley's. Carroll initiated not just one but two confrontations with Smith. Further, Carroll actually bumped into and poked Smith. The second confrontation initiated by Carroll became so heated that Smith picked up a drill and raised her hand to strike Carroll if necessary to defend herself. Smith complained to Lewis on both occasions. Lewis, however, who admitted he was aware that Carroll was opposed to the Union, took no disciplinary action against Carroll. I find that by issuing the written warning to Wiley, a known union adherent, while taking no disciplinary action against Carroll, who was known to oppose the Union, Respondent discriminated against Wiley in violation of Section 8(a)(1) and (3) of the Act.

In mid-August 1990, Respondent admits unilaterally implementing a prebid procedure for skilled positions. Prior to this time, Respondent and the Union had tentatively agreed during contract negotiations to a prebid procedure limited to sewing machine operator positions. In mid-August, however, Respondent unilaterally posted a prebidding procedure for positions of folders, boxers, and baggers. When the Union filed a charge with the Board regarding this matter, Respondent took down its posting.

Respondent argues that its admitted unilateral posting of this expanded prebid procedure did not violate the Act because it was merely a logical extension of what had been agreed to by the parties during negotiations. At first blush, Respondent's argument carries some surface appeal. Upon further analysis, however, one sees the no-win position into which Respondent had manipulated the Union. By the time

Respondent unilaterally instituted this prebid procedure, the employee petition had been circulated and signed by numerous employees stating they did not wish to be represented by the Union. Respondent had officially taken the position that any collective-bargaining agreement would have to expire coextensive with the certification year in October. The likelihood of reaching an agreement was effectively nil. Only a week before unilaterally instituting this prebid procedure, Respondent had had it pointed out by the Board that the employee petition was not signed by a majority of employees, and Respondent had at least officially withdrawn the requirement that any agreement expire with the end of the certification year. By unilaterally instituting this expanded prebid procedure, Respondent was sending the clear message to employees that it was willing to give them benefits directly above and beyond those which it was willing to grant them through the Union. There is no better way to foment dissatisfaction among employees than to convince them they can get more directly from their employer than they can get through having a union represent them. When the Union filed a charge with the Board, Respondent withdrew its posting, thereby once again making the Union look like the villain who was causing employees to lose benefits. I find that Respondent's unilateral actions tended to undermine the Union as the collective-bargaining representative of employees and violated Section 8(a)(1) and (5) of the Act.

Last but not least, the complaint alleges and counsel for General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union on October 15, 1990, and by the subsequent unilateral changes in wages, hours, and working conditions. Respondent argues that the October 15 withdrawal of recognition was lawful, having resulted from the employee petition presented to it on October 12 containing the signatures of 76 employees in a unit of 139 employees expressing dissatisfaction with the Union. There is no question that the petition presented to Respondent on October 12 expressing dissatisfaction with the Union was signed by a majority of bargaining unit employees. Nor is there any contention that Respondent played a direct role in the preparation or circulation of that petition. Nevertheless, I find for the reasons expressed below that by withdrawing recognition from the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

It has long been recognized that for an employer to withdraw recognition from the certified union based on an employee petition such as that present here, the employee petition must have been circulated in an environment free of other unfair labor practices or other employer conduct aimed at causing employee disaffection with the Union. Here, several unfair labor practices committed by the Respondent occurred prior and simultaneously with the circulation of the petition among employees. The withdrawal of recognition followed Respondent's unilateral reorganization of the warehouse and elimination of bargaining unit work, its unlawful insistence on a contract duration coterminus with the certification year, Respondent's threat of reprisal against employees because of the Union and its implied promise of benefit to employees to encourage them to withdraw support from the Union, Respondent's failure to provide the Union with relevant information relating to safety and health matters, Respondent's discriminatory and unlawful issuance of a written warning to employee Christine Wiley, and Respondent's uni-

lateral implementation of a prebid procedure for skilled positions. It is apparent from the nature of these unfair labor practices that Respondent, through its unlawful conduct, sought to undermine the relationship between its employees and the Union. In such circumstances, Respondent cannot meet its burden of showing that the employee petition was untainted. *Hearst Corp.*, 281 NLRB 764 (1986). I find, therefore, that Respondent's withdrawal of recognition from the Union violated Section 8(a)(1) and (5) of the Act, as did its subsequent unilateral changes in employees' pay, fringe benefits, and working conditions. *Hearst Corp.*, supra at 765.

CONCLUSIONS OF LAW

1. Respondent Suzy Curtains, Inc. and Lorraine Home Fashions of China is, and has been at all times material, a single integrated business enterprise and a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent unilaterally promoted an employee and unilaterally reorganized its warehouse, thereby removing bargaining unit work, without giving proper notification to, or bargaining with, the Union, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

4. Respondent insisted that the duration of the first collective-bargaining agreement with the Union be coextensive with the Union's initial certification year without having a reasonable belief based on objective considerations that the Union no longer possessed majority support, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

5. Respondent threatened reprisal against employees because of the Union and impliedly promised benefits to employees to encourage them to withdraw support from the Union, and Respondent thereby violated Section 8(a)(1) of the Act.

6. Respondent failed and refused to provide the Union with relevant information relating to health and safety matters, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

7. Respondent issued a written warning to employee Christine Wiley because of her activities on behalf of, or support for, the Union, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

8. Respondent unilaterally implemented a prebid procedure for skilled positions without notifying the Union, or giving it an opportunity to bargain about this matter, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

9. Respondent unlawfully withdrew recognition from, and thereafter failed and refused to recognize and bargain with, the Union as the exclusive representative of Respondent's employees, and subsequently engaged in unilateral changes in employees' pay, fringe benefits, and working conditions, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

10. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead labor disputes burdening and obstructing commerce and the free flow

of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The Union seeks an order extending its certification for a year in order to require Respondent to bargain with it in good faith for a sufficient time that it can reasonably be said the Union had a fair chance to succeed. In support of this proposition, the Union cites *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). Counsel for General Counsel seeks an extension of only 6 months. I agree with the Union that the Board's obligation here is to assess the effect of Respondent's unlawful conduct on the bargaining process and impose a countervailing remedy equal to the task of restoring the status quo ante. I agree, too, that the facts here warrant extending the certification for a 1-year period.

While I would not characterize Respondent's unfair labor practices in this case as egregious, their effect on the bargaining process is nevertheless disastrous. Beginning in June 1990 with the unilateral reorganization of its warehouse and elimination of bargaining unit work and continuing through January 1991 with the unilateral implementation of a new attendance policy, Respondent engaged in substantial and significant unfair labor practices which tend to undermine the collective-bargaining process. Respondent unlawfully insisted that any collective-bargaining agreement terminate with the end of the certification year. It made it known to employees that raises could not be granted because of the Union and impliedly promised employees a raise in order to create disaffection with the Union. It discriminatorily issued a written warning to one of the principal union adherents while allowing a known union opponent to engage in even worse conduct without any repercussion. I find it particularly significant that Respondent engaged in numerous unilateral changes, which tended to undermine the bargaining process. Among these were numerous unilateral changes immediately after Respondent withdrew recognition which for the most part granted employees various benefits which had been proposed by the Union during negotiations. The inevitable effect of unilaterally granting employees benefits is to underscore in the minds of employees the fact that the Employer has the sole power to change working conditions and affect employees' lives without regard for the Union. In these circumstances, therefore, extending the Union's certification for a period of 1 year is a reasonable response to provide a sufficient period of time so that the bargaining process can have a fair chance to succeed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

¹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Suzy Curtains, Inc. and Lorraine Home Fashions of China, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Insisting that the first collective-bargaining agreement with the Union be coterminous with the Union's certification year when Respondent does not have a reasonable belief based on objective considerations that the Union no longer possesses majority support.

(b) Unilaterally reorganizing its warehouse or other departments, and unilaterally promoting employees to supervisory positions, resulting in a loss of bargaining unit work, without notifying the Union and giving it an opportunity to bargain about such matters.

(c) Threatening employees that raises would be withheld or with other reprisals because of the Union and/or promising benefits to employees to encourage them to withdraw support from the Union.

(d) Failing and refusing to provide the Union with relevant information relating to health and safety matters affecting bargaining unit employees.

(e) Issuing written warnings to or otherwise discriminating against employees because of their activities on behalf of, or support for, the Union.

(f) Unilaterally implementing prebid procedures for bargaining unit positions without first notifying the Union and giving it an opportunity to bargain about such matters.

(g) Withdrawing recognition from, and thereafter failing and refusing to recognize and bargain with, the Union as the exclusive bargaining representative of employees in the following appropriate unit:

All production and maintenance employees, shipping and receiving employees, plant clericals, and assistant supervisors at the Respondent's 433 Barringer Drive, Charlotte, North Carolina facility; excluding all office clerical employees and guards and supervisors as defined in the Act.

(h) Unilaterally granting wage increases, unilaterally changing methods of computing pay, unilaterally granting employees holidays, unilaterally changing its procedure for selecting employees to work during inventory, unilaterally implementing new attendance policies, and/or unilaterally changing other terms and conditions of employees in the bargaining unit without notifying the Union and giving it an opportunity to bargain about such matters.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revoke the written warning to Christine Wiley, expunge this warning and any reference to it from her personnel file, and notify her in writing this has been done, and that evidence of the unlawful action against her will not be used as a basis for future personnel actions against her.

(b) Recognize and, on request, bargain in good faith with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC as the exclusive collective-bargaining representa-

tive of employees in the following appropriate bargaining unit:

All production and maintenance employees, shipping and receiving employees, plant clericals, and assistant supervisors at the Respondent's 433 Barringer Drive, Charlotte, North Carolina facility; excluding all office clerical employees and guards and supervisors as defined in the Act.

(c) Post at its Charlotte, North Carolina facilities copies of the attached notice marked "Appendix."² Copies of the no-

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the

tice, on forms provided by the Regional Director for Region 11, after being signed the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."